No. 54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

THE WHITE MOTOR COMPANY, *Appellant,*

v.

UNITED STATES, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

REPLY BRIEF FOR APPELLANT

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Introduction

The Government has not met White's contentions. Rather, it has sought to avoid their force by advancing theoretical objections to White's sales arrangements and by arguing the obvious convenience that any *per se* rule gives the prosecutor.[1] Neither the business practicalities nor the force of the "rule of reason," as enunciated in *Standard Oil,*[2] can be thus pushed aside.

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[1]This argument should meet the same fate here that befell it in Brown Shoe Co. v. United States, 370 U. S. 294 (1962). Compare Commissioner of Internal Revenue v. Duberstein, 363 U. S. 278 (1960).

[2]Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911).

White is doing business in a very competitive market. It needs a strong dealer organization to battle larger competitors. The Government suggests that White should do business differently. Instead of insulating its dealers from each other's competition so that all of their competitive energies can be directed against competing manufacturers, it is suggested that White should only blunt the force of this competition by providing areas of primary responsibility for its dealers.[3] This view is advanced without the Government's having any reason to believe that White's competition with other truck manufacturers would thereby be made greater or less as to price, safety, or service. The Government goes on to argue that other substitute means are available for limiting intrabrand competition among White dealers,[4] and that these substitutes have been found adequate by industry, including the automobile industry. There is little basis for this sweeping generality. Moreover, the possibility that truck manufacturers, or White, might have

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[3]See the Government's brief, pp. 25-26. This suggestion comes as something of a surprise in this Court, in view of the fact that White's efforts in the Court below to obtain permission to use this very primary-responsibility plan were opposed by the Government and defeated by the Court. See R. 95-96 (judgment proposed by Government): R. 100, 104-5 (defendant objects, asks for permission to institute areas of primary responsibility); R. 109 (Court below accepts Government's proposal). Indeed, ¶ VI.(A) of the decree, as proposed by the Government, R. 95-96, and entered by the Court, R. 109, could well be read as a prohibition of the primary-responsibility plan. It is not very charitable of the Government to rely in this Court on an alternative mode of distribution to which it successfully objected in the District Court. In any event, the Government's suggestion scarcely meets White's business problem. See pp. 15-16, *infra*.

[4]All in all, this line of argument appears to recognize that intrabrand competition must be regulated to merchandise effectively. Thus, the Government's brief tacitly supports the recommendations of the Department of Commerce and the Small Business Administration cited by White. (Brief for Appellant, pp. 14-17, 18-20). No effort is made to deny the relevance of these recommendations, or to suggest that small businessmen have ignored them.

special problems meriting factual investigation, is completely overlooked.

These factual arguments are a sign of weakness. The Government cannot rely on such "facts." Its case of necessity compels it to maintain that the facts are irrelevant.

Furthermore, the Government evades the real issues. What social purpose is served by forcing White to use different techniques to minimize competition among its dealers? What social purpose is served by insisting upon a rule that might well result in White's abandoning its entire system of independent dealers and conducting its business on a strictly territorial basis through its own employees? It is a disservice to the principles of the Sherman Act to suggest rules of conduct that cannot be supported in common sense, that are highly legalistic and conceptual in nature,[5] that are written in no statute, and that run counter to long-established methods of doing business, without any supporting economic or business evidence.

The Government's position is a very broad one, with far-reaching consequences. While it lacks the courage to come out and say so, its brief is in reality an attack on the "rule of reason" as such. The arguments advanced are applicable to any restraint, whether it be an employee covenant not to compete, a requirements contract, or any one of numerous other restraints found in the daily business life of this country and traditionally lawful under "the rule of reason."[6]

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[5] Even if the problem is viewed solely as an exercise in conceptual legalisms, the Government's position is without merit. See pp. 5-15, *infra*.

[6] Even tying contracts may be legal under extraordinary circumstances. Loew's, Inc. v. United States, ____ U. S. ____, 83 S. Ct. 97 (1962); Brown Shoe Co. v. United States, 370 U. S. 294, 329-30 (1962). The Government's argument comes perilously close to advocating a return to the medieval rule that *all* restraints of trade are unlawful. See, *e.g.*, Dyer's Case, Y.B. 2 Henry V., fol. 5, pl. 26 (1415) (dictum).

This Court has no experience with the commercial and merchandising problems in the truck or other fields to support the far-reaching edict that the Government seeks. It is not an answer to say that the law demands such a rule; that argument is totally question-begging. The flexible and indefinite requirements of the Sherman Act do not provide a clear directive to justify setting aside White's dealer agreements on the ground that Congress in 1890 so decreed. The Act has been effective precisely because it was long ago construed to contain a "rule of reason." Its application is a matter to be determined gradually on a case-by-case basis and attuned to changing business patterns.[7] The District Court erred in ignoring this wisdom and failing to accept the insistent teachings of the precedents. That error should not be compounded now by succumbing to suggestions that it is too inconvenient to test conceptual propositions against facts through the time-honored process of trial.

We now proceed to deal, first, in some detail with the principal legal arguments made by the Government, and, second, to inquire into a few of the facts claimed by the Government to demonstrate that White's agreements are pernicious and without redeeming virtue.

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[7]Note that the injunction against White in this case is perpetual. Under the Government's theory, no changed circumstances could ever justify a modification of this equity decree.

I.

The Government's Argument—That All Agreements Between Competitors Restricting the Competition of the Parties in Territories or for Customers Are Illegal *Per Se* —Flies in the Face of the "Rule of Reason," Is Contrary to the Doctrine of Ancillary Restraints and Is Contradicted by the Cases.

The Government relies heavily on the line of cases holding that various agreements between competitors or potential competitors placing naked, non-ancillary restraints on competition with each other, particularly agreements to divide or allocate territories or customers, are illegal *per se*. The Government argues that those cases hold that *all* restraints of such nature, whether naked or merely ancillary, are unlawful *per se*. In short, illegality is to be determined by the kind of restraint, and all agreements between competitors or potential competitors restricting the place where or the persons with whom one or both of such competitors may compete are without more unlawful. (U. S. Brief, pp. 11-20).

This position is not supported by the decisions. Even cases cited by the Government conclusively demonstrate that the proposition is erroneous. Thus, in the *Oregon Steam Navigation Co.* case[8] (decided under common law) this Court sustained an agreement between competitors restricting the territorial competition of one of them—the very type of restrictive contract that the Government so earnestly argues is *never* valid. And all of the kinds of restraints catalogued by Judge Taft in the *Addyston Pipe* case[9] as valid if reasonable also directly prevent competition between actual or potential competitors.

[8]Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64 (1874).

[9]United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), *modified in other respects* 175 U. S. 211 (1899).

To such cases may be added other relevant decisions by this Court under both common law and the Sherman Act. For example: In *Cincinnati, P., B. S. & P. Packet Co.* v. *Bay*, 200 U. S. 179 (1906), this Court sustained under the Sherman Act an agreement between competing shipping lines under which, in connection with the transfer of a number of vessels, the vendee imposed territorial restrictions on the conduct of the vendor's shipping business. In *Fowle* v. *Park*, 131 U. S. 88 (1889), this Court enforced, under common law, an agreement, made in connection with a transfer of certain rights to a trade secret, restricting territorial competition between competitors in the sale of a product made under the trade secret. In *Board of Trade of the City of Chicago* v. *Christie Grain and Stock Co.*, 198 U. S. 236 (1905), this Court enforced, under both common law and the Sherman Act, contracts under which the Board of Trade furnished telegraph companies with its quotations and limited the telegraph companies as to the persons to whom the telegraph companies could distribute them. In *Associated Press* v. *United States*, 326 U. S. 1 (1945), this Court sanctioned, under the Sherman Act, restraints limiting the right of certain newspapers to sell or dispose of to others, not only the news supplied to them by the Association, but also the news gathered by the newspapers themselves.

Finally, there is the wealth of federal, state and English authorities—some are cited at pages 22-28, 34-39 of our main brief—sustaining the validity of agreements restricting the place where or the persons to whom vendees of property may resell, under the Sherman Act, other federal antitrust laws and common law.

Thus, it is manifest that agreements between competitors or potential competitors restricting territorial competition or restricting competition for particular customers or classes of customer are not *ipso facto* illegal. The cri-

terion of legality or illegality is not universally and invariably the mere kind of restraint, but rather the type of restraint considered in connection with the ancillary or non-ancillary nature of the restraint.[10] As the Government's cases show, where the restraint is a naked, non-ancillary restriction on competition having no purpose or effect other than restraint of that competition, the restraint is illegal. But, as those cases and the others referred to above also show, where the restraint is in aid of and ancillary to a larger, lawful transaction, the "rule of reason" applies. The legality of the restraint then depends on the facts relevant to the application of the "rule of reason"—a process plainly requiring the trial that has been hitherto withheld in this case.

II.

The Government's Argument—That the Legality of an Ancillary Restriction Depends on the Nature of the Property to Which the Restriction Relates, *i.e.*, "Capital" Assets Versus "Repetitively" Sold "Inventory" Assets—Is Unsupported by the Rationale and Holdings of the Cases.

Despite the sweeping argument with which the Government commenced its brief, it later obviously felt compelled to deal with a few of the cases sustaining the validity

[10]The fact, pointed out by the Government, that the opinion in Northern Pacific Railway Co. v. United States, 356 U. S. 1, 5 (1958), in cataloguing a number of categories of *per se* restraints, included "division of markets" without distinguishing between naked, horizontal restraints and vertical, ancillary restraints is without significance. The opinion was obviously referring to the familiar class of naked, horizontal market divisions between competitors, as demonstrated by the case cited in connection with the category (*Addyston Pipe*), and it is scarcely to be expected that in a one-sentence, shorthand reference to a number of categories the opinion would indulge in close definition of a well-understood term.

of ancillary restraints and to admit that there are, indeed, at least some exceptions to the broad rule it had previously urged. The Government admits that under some circumstances, at least, a seller of property may lawfully impose territorial restrictions on a competitor to whom it sells its property. That concession is, however, a grudging one; it extends only to the situation where the property involved is a capital asset, as distinguished from inventory-type assets—the sole situation to which, the Government claims, the cases permit the application of the admitted exception. (U. S. Brief, pp. 38-44).

However, the courts have not in terms limited their holdings of the validity of ancillary restraints to situations where the restraints accompany sales of capital assets; but in every case where inventory assets were involved, the courts have nevertheless sustained the validity of such restraints. In the *Associated Press* case, *supra*, for example, this Court sanctioned restraints on the disposition of an inventory-type of property, news. Just as White is in the business of selling trucks, *Associated Press* was in the business of selling news, and in each case vendees of both concerns are engaged in the business of reselling what they have themselves bought. And in the great bulk of the cases cited in White's main brief and referred to above, the courts, whether federal, state or English, have sustained under both the antitrust laws and common law agreements containing territorial and customer restrictions relating to a variety of products involving "repetitive sales of goods manufactured on order or sold from inventory in the regular course of business."[11] The supposedly compelling force of the distinction sought to be drawn by the Govern-

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[11]See, *e.g.*, Green v. Electric Vacuum Cleaner Co., 132 F. 2d 312 (6th Cir. 1942), *cert. granted* 318 U. S. 753, *cert. dismissed on motion of petitioner* 319 U. S. 777 (1943); Phillips v. Iola Portland Cement Co., 125 Fed. 593 (8th Cir. 1903), *cert. denied* 192 U. S.

ment has evidently escaped the many courts that have not made any such distinction.

The cases cited by the Government that supposedly draw such a distinction—*Adams* v. *Burke*, 17 Wall. 453 (1873); *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659 (1895); *Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U. S. 373 (1911); *Boston Store of Chicago* v. *American Graphophone Co.*, 246 U. S. 8 (1918); *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339 (1908); and *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436 (1940)—are actually not based on any such distinction.

The *Boston Store* and *Bobbs-Merrill* cases are merely price-fixing cases, like the *Dr. Miles* case, which is discussed at some length below. Similarly, in *Ethyl Gasoline*, where the defendants maintained an elaborate system of patent licensing, covering a number of patents indispensable for the manufacture of gasoline, this Court struck the system down because its purpose and effect was to fix the price at which the patent licensees sold gasoline and to regiment an entire industry.

The *Adams* and *Keeler* cases are concerned solely with the scope of the patent monopoly and have nothing whatever to do with the extent to which the patentee or licensee

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606 (1964); Revlon, Inc. v. Regal Pharmacy, Inc., 29 F. R. D. 169 (E. D. Mich. 1961); Reliable Volkswagen Sales & Serv. Corp. v. World-Wide Automobile Corp., 182 F. Supp. 412 (D. N. J. 1960); King Motors, Inc. v. Delfino, 136 Conn. 496, 72 A. 2d 233 (1950); McConkey v. Smith, 112 Kan. 560, 211 Pac. 631 (1923); Revlon Prods. Corp. v. Bernstein, 204 Misc. 80, 119 N. Y. S. 2d 60 (Sup. Ct. 1953), *aff'd mem.* 285 App. Div. 1130, 142 N. Y. S. 2d 364 (1955); Hickok Mfg. Co. v. Fairley Trading Corp., 117 N. Y. S. 2d 874 (Sup. Ct. 1952); Kessler v. A. W. Haile Motor Co., 127 Misc. 413, 217 N. Y. Supp. 182 (Sup. Ct. 1926); Johnston v. Franklin Kirk Co., 83 Ind. App. 519, 148 N. E. 177 (1925); *In re* Austin Motor, Ltd.'s Agreements, [1958] 1 Ch. 61 (1957); *cf.* Boro Hall Corp. v. General Motors Corp., 37 F. Supp. 999 (S. D. N. Y. 1941), *aff'd* 124 F. 2d 822, *rehearing denied* 130 F. 2d 196 (2d Cir. 1942), *cert. denied* 317 U. S. 695 (1943).

manufacturer may lawfully control the resale or use of the patented articles by those to whom they have been sold. The cases hold simply, in the former case, that one who buys a patented article from one having rights under the patent limited to one area of the United States is not an infringer by virtue of his use of the article in another section of the United States; and, in the latter case, that one who buys a patented article from the patentee or a licensee having similarly limited rights is not an infringer by virtue of his resale of the article in another section of the United States. Not only did the Court not draw the distinction in those cases that the Government now urges, but the Court expressly avoided passing on the validity of an agreement by the seller of a patented article restricting the purchaser's use or disposition of the article. In the course of expressing "no opinion" on this question, the Court said: "It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws." 157 U. S. at 666. Moreover, in *Hobbie v. Jennison*, 149 U. S. 355, 363-64 (1893), another patent case, a unanimous Court stated that contracts limiting the licensees' territories of resale would be valid.

That the courts have not drawn the distinction urged by the Government should occasion no surprise, in view of the fact that there is nothing in the rationale of the cases sustaining ancillary restrictions that inherently limits its application to restraints ancillary to sales of capital assets, as distinguished from inventory assets. Basically, that rationale is that it is reasonable to permit a seller to restrict competition of his own creation for the protection of the business that he retains. There is no essential difference between the case of a seller of capital assets who creates a potential competitor and who desires to be protected against that competitor in his retained business and the case of a seller of

inventory goods who likewise creates potential competitors in respect of his retained business and desires protection against that competition. In either case the competition is of his own creation. In either case the seller is continuing to carry on his own business, and it is the business of the seller that is being protected.[12]

III.

Neither *Dr. Miles* Nor *Bausch & Lomb* Controls the Present Case.

It is apparent, in the end, that the Government places its ultimate reliance on the *Dr. Miles* and *Bausch & Lomb*[13] cases, which in its view present an analogy controlling the present case. (U. S. Brief, pp. 20-21, 33-38, 46-48). Those cases hold, of course, that vertical resale-price-maintenance agreements are illegal *per se*, and the argument is that, by analogy, vertical agreements containing territorial and customer restrictions must also be unlawful.

Although the argument is not without a degree of plausibility, it is worth noting again that, up to the time of the decision in this case, no opinion of any court, nor any secondary authority,[14] had embraced that argument in the

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[12] Indeed, the accepted rationale of the validity of restrictions ancillary to the sale of property does not even require that the competition permitted to be protected be that created by the one obtaining protection and which, but for him, would not exist. In the *Cincinnati Packet* case, *supra*, for example, the buyer was given protection against the seller, who agreed to withdraw from competition between certain transportation points.

[13] United States v. Bausch & Lomb Optical Co., 321 U. S. 707 (1944).

[14] The secondary authorities writing on the subject include the learned, incumbent Assistant Attorney General, one of Government counsel herein. Loevinger, *The Law of Free Enterprise* 114-15 (1949).

half century that it had been available. It should occasion at least some pause that all other courts have consistently decided cases oppositely to what the ancient, but well-known and quite vital, *Dr. Miles* case is now claimed to have required.

The refusal of the courts to be controlled by the "controlling" authority becomes understandable upon further examination of the problem. Analysis readily demonstrates that the argument by analogy from price-fixing cases is without firm foundation.

A fact of no little relevance to the validity of the analogy is that the *per se* rule as to price agreements found strong support even in the common law as developed prior to the Sherman Act. Indeed, at the very time and in the very case in which the "rule of reason" was announced by this Court as to other types of restraints, *Standard Oil*, price agreements were recognized as an exception. *Dr. Miles* and *Standard Oil* were argued in the same month of the same Term of Court and decided almost at the same time. When the development of the law was later extensively reviewed by this Court in *Trenton Potteries,*[15] this same distinction was recognized.

This distinction, which defeats the Government's analogy, is strikingly demonstrated by the *Cincinnati Packet* case, *supra,* this Court's first and leading decision under the Sherman Act on the validity of ancillary restraints on territorial competition. In that case, ancillary to the sale of various vessels by one shipping line to another were two restrictive agreements—one imposed by the buyer on the seller calling for the withdrawal of the seller from competition between certain shipping points; the other imposed by the seller on the buyer requiring the buyer to maintain the same rates as the seller. This Court, as indicated above, sustained the validity of the former restraint, and

[15]United States v. Trenton Potteries Co., 273 U. S. 392 (1927).

at the same time refrained from decreeing the invalidity of the latter restraint only because, for reasons stated in the opinion, the illegality of that restriction was not deemed germane to the decision. Here, then, in a case involving horizontal, ancillary restraints—surely as suspect from the antitrust standpoint as vertical restrictions— this Court itself drew the distinction between price-fixing and territorial restraints.

That distinction is a rational and significant one. The Government's argument is that, if a restriction merely restraining prices is unlawful, then a territorial or customer restraint—a "total" elimination of competition of "identical" effect—must also be illegal. The deceptive nature of that argument lies in the erroneously assumed identity of effect.[16] Under a resale-price-maintenance program such as *Dr. Miles* involved, dealers could not compete as to price even with dealers in different brands. Under White's territorial agreements, on the other hand, the prices charged by dealers are not controlled as to trucks, parts, services or in any other respect. Thus, not being handicapped as he meets the competition of White's giant competitors, the White dealer is free to pass on the benefits of any efficient distribution methods he may devise or to adopt a high-volume, low-profit policy and thus to promote interbrand competition.[17]

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[16] Moreover, identity of effect, even if it exists, is not in all cases a conclusive, or even a valid, argument. If it were, no merger between competitors would ever be valid. Nor would any ancillary restraint such as was involved in, for example, the *Oregon Steam Navigation* and *Cincinnati Packet* cases. It can scarcely be argued that the restraints involved in any such merger or in such cases have any different effect from what they would have if they were the result of naked, unlawful restrictive agreements between competitors.

[17] The Government asks, "What is the importance of *interbrand* as opposed to *intrabrand* competition?" (U. S. Brief, p. 31). This puzzlement cannot be real. When the comparison is between competition among White dealers and competition among White, General Motors, Ford and the rest, the question hardly seems worth asking.

In the light of the foregoing, the following comments in Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 Harv. L. Rev. 795, 800-01 (1962), are fully warranted:

> "Nor [referring to the prior conclusion that the *Bausch & Lomb* case is also distinguishable] do the *Addyston Pipe* and *Dr. Miles* decisions compel the illegality per se of territorial and customer restrictions, even apart from the possibility of distinguishing those cases as being half a century old and hence not necessarily applicable to today's business world. For the restraints with which the Supreme Court dealt there were quite different from those involved in *White Motor* . . . . In any case it remains to be demonstrated that the necessary effect of territorial and customer restrictions imposed by the manufacturer is at all similar to the settled propensity of resale price maintenance to prevent dealers or distributors from passing the benefits of efficient distribution on to consumers by adopting a high-volume, low-markup policy, to facilitate parallel pricing at the manufacturer's level, to carry an oligopolistic price structure down from the manufacturer's level into the chain of distribution, and otherwise to injure competition . . . ."

Bausch & Lomb is merely another resale price maintenance case, like *Dr. Miles*, and has been uniformly so regarded, even by Judge Rifkind, who had the case in the District Court. Rifkind, *Divisions of Territory Under the Antitrust Law*, in CCH, *Antitrust Law Symposium—1953*, at 173 (1954). It had nothing whatever to do with territorial restraints. To the extent that customer restrictions were involved in the case, they were merely in aid and a part of the price-fixing agreements. The bearing of *Bausch & Lomb* on the present case was fully discussed in the Brief For Appellant In Opposition To Appellee's Motion To

Affirm, at pp. 4-7—previously filed herein and to which the Court's attention is respectfully directed—wherein it is demonstrated that *Bausch & Lomb* is not in point.

IV.

The Government's Suggested Alternatives by Which White Supposedly May Maintain a Distribution Organization Competitively Effective in Interbrand Competition and May Maintain Its Reputation As a Custom Builder of Trucks Offer No Solution of the Practical Business Problems to Which White's Territorial and Customer Agreements Are Directed.

A. The Problem of Maintaining a Strong Distribution Organization Is Not Met Either by the Various Controls of or Sanctions Against the Dealers Suggested by the Government, but by the Territorial Agreements Employed by White.

In deprecating the business justifications suggested by White as supporting the reasonableness of the territorial restrictions in its agreements with its distributors and dealers, the Government repeats the various devices suggested by the court below, and advances a number of its own, that it claims would constitute a "wide and effective range of tools for developing a network of distributors and dealers who are financially sound and capable of vigorously promoting the sale of its trucks in every market." (U. S. Brief, pp. 25-26). On their face, the suggestions clearly represent an unrealistic, naive approach to the very practical problems faced by White in the distribution of its products.

A principal problem faced by White is how to secure and retain a financially sound distribution organization capable of carrying on effective interbrand competition. The solutions offered by the Government consist by and large of

various ways of controlling or placing sanctions against the dealers. Contractual requirements that the dealers spend specified amounts of time and money in sales promotion, that the dealers maintain adequate facilities, that the dealers assume "primary responsibility for sales coverage for specified areas and classes of customers,"[18] etc. are proposed. Finally, it is suggested that, if all else fails, White may cancel the dealers' franchises or impose some lesser sanction. While the suggestions of the Government are relevant to keeping unzealous dealers up to the mark—and White in fact already employs a number of the suggested devices—those suggestions scarcely touch the basic problem of how the dealers may be kept in financial shape to fulfill the obligations that the Government suggests White place on them and to avoid the sanctions that the Government so kindly suggests that White use against them.[19]

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[18] As to this particular suggestion, see also footnote 3, page 2, *supra*.

[19] One wonders on what basis the Government states that such methods "have been found adequate by American industry in general" (U. S. Brief, p. 26), when it is common knowledge that wide segments of American industry have apparently found it otherwise, and official organs of the Government have seen fit to counsel business and industry as to the advisability of employing territorial franchises. See Brief for Appellant, pp. 12, 14-16. In this connection, the Government's argument that the abandonment of territorial and customer limitations by various concerns under the pressure of existing legal action by the Government or under the threat of legal action —in some cases, criminal prosecution—proves that industry has determined that such limitations are unnecessary, is at least a curious one.

In any event, what may or may not be true for "industry in general" has certainly no necessary relevance to White or, doubtless, to others with similar problems. With respect to the Government's argument from the automobile industry (U. S. Brief, pp. 26-28), the problems of the truck industry, which produces a total of 80,000 heavy-duty trucks a year—some, like White's, custom-made—are quite different from those of an industry that produces 7,000,000 stock-model cars a year. Finally, as we have earlier pointed out, the nature of the problem and what is reasonably necessary to solve it involve factual issues that are hardly susceptible of determination on summary judgment and without a trial. (Ninety percent of White's business is in heavy-duty trucks)

B. White's Reputation As a Custom Builder of Trucks Can Be Effectively Preserved, Not by the Exhortations to the Public Proposed by the Government, but Only by White's Control of Who Will Be the Dealers Who Necessarily Play an Important Part in Such a Custom Business.

In discussing White's customer restrictions, the Government deals in a single sentence with the rather singular problem presented by White's custom sales of trucks. As was pointed out in White's main brief (at pp. 17-18), in the custom manufacturing and selling of trucks the dealer participates in a very real way in the design and thus in the construction of the trucks. Thus, White's reputation as a custom builder, on which it depends for its existence as a competitor of the giant non-custom truck manufacturers, is necessarily at the mercy of dealers—hence White's restriction preventing the sales of trucks through unauthorized dealers in whose selection and operations White can have no voice. As to that problem, the Government contents itself with the assertion that *Dr. Miles* controls and that White's problem can be "substantially" solved "by such legitimate means as informing the public of the advantages of dealing with the distributors or retailers it chooses and officially recommends" (U. S. Brief, p. 49). The ivory-tower nature of that suggestion as a solution of a very practical and important problem seems obvious. And the notion that *Dr. Miles*, whatever its effect on other types of restrictions may be thought to be, requires the prohibition of the only practical method of ensuring the quality of White trucks, and thus White's reputation, is preposterous.[20]

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[20] Unlike here, in *Dr. Miles* the product was a "patent" medicine, in the manufacture of which the dealers neither played, nor could have played, any part. See *Dr. Miles, supra*, 220 U. S. at 407.

Conclusion

It is submitted that the decision below, if allowed to stand, will result in a strait-jacketing of business not required by any precedent and in total disregard—indeed, in ignorance—of business realities.

Respectfully submitted,

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